

Subcommittee Advances Nadler's State Secrets Legislation

Thursday, 11 June 2009

WASHINGTON, D.C. – Today, Congressman Jerrold Nadler (D-NY), chair of the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, chaired a Subcommittee markup approving his critical legislation to reform the state secrets privilege. The bipartisan H.R. 984, the State Secret Protection Act of 2009, is co-sponsored by Reps. Thomas Petri (R-WI), House Judiciary Chairman John Conyers, Jr. (D-MI), Bill Delahunt (D-MA) and Zoe Lofgren (D-CA). The bill would ensure meaningful judicial review of the state secrets privilege and prevent premature dismissal of claims, while ensuring protection of national security interests.

“In order for the rule of law to have any meaning, individual liberties and rights must be enforceable in our courts,” said Nadler. “Rights without remedies cease to be rights. We all understand the need to protect national security, but both individual justice and national security can and must be protected. The government simply cannot be allowed to hide behind unexamined claims of secrecy.”

The state secrets privilege allows the government to withhold evidence in litigation if its disclosure would harm national security. The purpose of the privilege is to protect legitimate state secrets; but if not properly policed, it can be abused to conceal embarrassing or unlawful conduct whose disclosure poses no genuine threat to national security.

In the past few years, the Bush administration's use of the privilege to dismiss cases challenging the most troubling aspects of its war on terror – including rendition, torture and warrantless wiretapping – have highlighted the need to ensure that judges do not simply accept a government's secrecy claim at face value. More recently, the Obama administration has adopted a similarly expansive view of the state secret privilege in cases challenging rendition to torture and warrantless surveillance of U.S. citizens, urging the courts to dismiss these cases outright without even allowing the parties to conduct non-privileged discovery. This underlines the continued need for clear guidance on

proper court handling of state secret claims.

The following is the text of Rep. Nadler's opening statement, as prepared:

“Today, the Subcommittee considers H.R. 984, the ‘State Secret Protection Act of 2009.’ This bill codifies uniform standards for dealing with the government's claims of a state secrets privilege in civil litigation.

“The Subcommittee has studied this issue extensively. We held a legislative hearing on the bill last week, and last Congress we held an oversight and legislative hearing as well. The insightful testimony and material that we received from several individuals and organizations has made it clear that Congress has the constitutional authority to codify the state secret privilege; that there is a need for legislative reform to curb executive abuse of the privilege and to assure consistency and fairness in our courts; and that Congress must exercise its authority and legislate in a way that ensures independent and meaningful judicial review of the privilege.

“In order for the rule of law to have any meaning, individual liberties and rights must be enforceable in our courts. Rights without remedies – and that's what we will have if the executive can have any case dismissed on the mere assertion of the state secrets doctrine – cease to be rights. Separation-of-powers concerns are at their highest with regard to secret executive branch conduct, and the government simply cannot be allowed to hide behind unexamined claims of secrecy.

“As the Court noted in rejecting the Bush and Obama Administrations claim that the entire ‘subject matter’ of the Jeppesen case – rendition to torture – was a state secret and required dismissal of

the entire case, the executive cannot become the judge of its own conduct. That is the definition of tyranny, and we cannot allow it in this country.

“Congress has already provided guidance to the courts for handling sensitive information in other contexts through FOIA, CIPA (or the Classified Information Procedures Act) and FISA. It is high-time that we provided similar guidance for handling claims of secrecy in civil litigation.

“Several of the witnesses who submitted testimony to this Committee — including federal judges, the former directors of the FBI and the CIA, and our former colleague Congressman Asa Hutchinson — argued persuasively that the courts have proven themselves fully competent to safeguard sensitive information, and it is the courts — not the executive branch — that are best qualified to balance the risks of disclosing evidence with the interests of justice.

“This bill, H.R. 984, provides guidance to courts when handling state secret privilege claims in the following key ways:

“First, H.R. 984 prevents premature dismissals by requiring courts to examine and rule on actual — not hypothetical — claims of harm that would be caused by disclosure of the particular information that the government seeks to withhold. This will return the state secrets privilege to its rightful place as an evidentiary privilege and not an outright claim of immunity for executive conduct.

“Second, H.R. 984 requires that all judges, using secure proceedings and other safeguards, must review the information that the government seeks to withhold to determine whether the harm identified by the government is likely to occur. Currently, the decision on whether the judge will review the information and make her own determination as to validity of the privilege claim or, instead, accept the government’s assertions as dispositive is left up to the individual judge. This has resulted in inconsistent and unfair results;

“Third, if the judge determines that the privilege has been validly asserted, H.R. 984 requires that judges prohibit harmful disclosure of the information and consider whether a non-privileged substitute can be created for the privileged information, allowing cases to go forward whenever possible while protecting valid state secrets. If a substitute is possible, H.R. 984 gives the government a choice: produce the substitute or have the court resolve the issue to which the evidence is relevant decided against it, as happens in CIPA;

“Finally, where there is no possible substitute, H.R. 984 allows the judge to issue appropriate orders, including dismissing a claim or finding for or against a party on a factual or legal issue.

“H.R. 984 allows the government to raise a claim of privilege to avoid answering allegations in a complaint, or in response to requests for discovery of information, but prevents premature dismissal of claims before all issues of privilege are resolved and the parties have the opportunity to conduct non-privileged discovery. In those cases where it is necessary and unavoidable, a court may still dismiss a case to protect valid state secrets.

“We all understand the need to protect national security, but both individual justice and national security can and must be protected. H.R. 984 ensures that — when the government raises the state secret privilege in civil litigation — the correct balance is struck. I urge all of the Members of the Subcommittee to support the bill.”

